BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LORI A. CHAFFIN	)	
Claimant	)	
VS.	)	
	)	Docket No. 177,089
STATE OF KANSAS	)	
Respondent	)	
AND	)	
	)	
STATE SELF-INSURANCE FUND	)	
Insurance Carrier	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Claimant appeals from a September 1, 1995, Award entered by Special Administrative Law Judge William F. Morrissey. The Appeals Board heard oral argument on February 14, 1996, in Wichita, Kansas.

APPEARANCES

Claimant appeared by her attorney, James B. Zongker of Wichita, Kansas. Respondent, a self-insured, appeared by its attorney, Jeffery R. Brewer of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Christopher Cole of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board reviewed the record and adopts the stipulations listed in the Award. Also, it was stipulated and agreed at oral argument that the Kansas Workers Compensation Fund should be dismissed from this proceeding. It is so ordered.

ISSUES

This case is docketed as a single claim but involves two separate and distinct accidents. The Special Administrative Law Judge denied benefits for the February 26, 1993, accident where claimant slipped on ice and fell in the parking lot on her way to work, fracturing her right arm. This claim for compensation also alleges injury to both upper extremities and right shoulder from a series of accidents beginning September 1992 through the date of the regular hearing on October 6, 1994. The Special Administrative Law Judge denied benefits for the bilateral upper extremities conditions and awarded benefits for a 5 percent scheduled injury to the right shoulder. Claimant appeals and seeks review of the Special Administrative Law Judge's findings concerning compensability and nature and extent of disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds as follows:

(1) On February 26, 1993, claimant slipped and fell in the parking lot, injuring her right arm. The parking lot was not-State owned and not State-maintained. Employees, including claimant, regularly utilized the parking lot but it was also open to the public. The State of Kansas, claimant's employer, paid a portion of the fee for claimant to utilize the parking lot and she was instructed to park there. The location where claimant slipped and fell was the most direct route for claimant to walk from where she parked to her place of employment.

Respondent contends claimant's injury did not arise out of and in the course of her employment as that phrase is defined in K.S.A. 1992 Supp. 44-508(f) because it excludes "injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties . . . ." The Special Administrative Law Judge found claimant's accident noncompensable citing Thompson v. Law Offices of Alan Joseph, 256 Kan. 36, 883 P.2d 768 (1994). The Appeals Board agrees with his conclusion. A portion of the parking lot where claimant fell was leased by respondent to provide parking for employees; however, the lot was neither owned, controlled, nor maintained by respondent. Accordingly, claimant was not on her employer's premises at the time of her fall. Claimant has failed to prove that any of the exceptions to the going and coming rule are applicable to the facts of this case. Although the surface of the parking lot was icy and slick, she was not on the only available route to or from her work and the route did not involve a special risk or hazard. Furthermore, the route was used by the public for purposes

other than for dealings with claimant's employer. As the employer was not responsible for the maintenance of the parking lot, claimant's injury was not due to the employer's negligence. Accordingly, K.S.A. 1992 Supp. 44-508(f) precludes recovery for the slip-and-fall injury. The finding by the Special Administrative Law Judge concerning the February 26, 1993, accident is affirmed.

(2) Claimant testified she had been employed by respondent for approximately ten years. In September 1992 she was working in the child support enforcement division which required a substantial amount of keyboarding work. About that time she started developing symptoms in her hands, arms, and right shoulder. Although she reported these symptoms to her supervisor, she continued to perform her regular job duties until February 26, 1993, when she was injured in the slip-and-fall accident. Claimant testified that her symptoms had gradually worsened over this period of time. When she returned to work following her right arm injury, she developed more problems in her left arm. Her employer eventually sent her for medical treatment with Dr. James L. Gluck and Dr. Robert L. Eyster. It was her testimony at regular hearing that she was still having pain in her wrists, arms, and right shoulder and that repetitive work such as computer keyboarding caused increased pain. Also, she had greater pain in her right shoulder when she raised her right arm overhead. She also reported grip weakness in both hands. On September 8, 1993, claimant was given a restriction by Dr. Gluck of no typing more than one hour at a time and no more than four hours per day. This restriction was given to claimant's supervisor and claimant's job duties were changed to accommodate Dr. Gluck's recommendations. A second set of restrictions were recommended by Dr. Gluck on November 24, 1993. Dr. Gluck again recommended certain temporary restrictions against repetitive typing activities and lifting. These restrictions were likewise given to claimant's supervisor. She was also given restrictions by Dr. Eyster. Claimant testified that her employer revised her job duties to accommodate her restrictions. Claimant testified that after being given restrictions, she was placed in accommodated employment and her symptoms thereafter plateaued or stabilized. According to claimant, her symptoms ceased to worsen at least several months before her October 6, 1994, regular hearing testimony.

At the request of her attorney, claimant was examined by Ernest R. Schlachter, M.D., on August 31, 1993. He diagnosed "overuse syndrome of both upper extremities and right shoulder girdle with right rotator cuff tendonitis, and bilaterally early carpal tunnel syndrome, right worse than the left and bilateral de Quervain's disease." Dr. Schlachter opined that claimant had a 5 percent permanent partial impairment of function to the body as a whole due to her right shoulder condition; a 15 percent permanent partial impairment of function to the right upper extremity, which converts to a 9 percent permanent partial impairment of function to the body as a whole; and a 10 percent permanent partial impairment of function to the left upper extremity, which converts to a 6 percent permanent partial impairment of function to the body as a whole. His ratings combined to a 19 percent permanent partial impairment of function to the body as a whole which he causally related to claimant's work with respondent. He further recommended "permanent restrictions of no repetitive pushing, pulling, twisting or grasping motions with either arm or hand. No use of vibratory tools or

working in cold environments. She should avoid repetitive lifting more than five pounds with either arm or hand and fifteen pounds on a single basis with either arm or hand."

Dr. Schlachter reexamined claimant on June 15, 1994, again at the request of her attorney. Claimant reported increased symptomatologies which were generally the same as she described during her previous examination except that they were slightly more severe. Dr. Schlachter did not change his previous functional impairment ratings. Likewise, he did not change his recommendations as to restrictions. He did not think that her condition had been permanently aggravated between the time that he first saw her on August 31, 1993, and his examination of June 15, 1994. However, in his opinion, her impairment did increase between February and August of 1993. The worsening of her symptoms after August 31, 1993, until June 15, 1994, were the result of a temporary aggravation from her work activities. Dr. Schlachter further opined that the broken-bone trauma which occurred in February 1993 did not cause any increase in her impairment from the repetitive use conditions.

The deposition testimony of board-certified orthopedic surgeon, Robert L. Eyster, M.D., was also taken in this matter. He felt claimant was suffering from overuse syndrome and carpal tunnel syndrome. He last saw claimant on September 19, 1994. He did not find any permanent impairment but did recommend claimant continue with stretching exercises, wearing a wrist splint, and that she continue with anti-inflammatory and pain medication. He further recommended that she continue working within the restrictions imposed by Dr. Gluck. Dr. Eyster did state that repetitive activities would clause claimant to be more symptomatic. However, in his opinion, as soon as she stopped doing those activities the symptoms should subside. Therefore, he did not think there was permanent injury.

Claimant is continuing to work for respondent in an accommodated position and is not making claim for work disability in excess of her functional impairment. In this instance, the Appeals Board finds the opinions of Dr. Schlachter to be more credible than those given by Dr. Eyster with regard to whether claimant has sustained permanent impairment. Accordingly, Dr. Schlachter's rating of 19 percent permanent partial impairment of function to the body as a whole is adopted by the Appeals Board as the more credible evidence on the extent of claimant's disability.

The Special Administrative Law Judge granted claimant a 5 percent permanent partial disability award for a scheduled injury to claimant's right shoulder pursuant to K.S.A. 44-510d(a). However, he denied benefits for the bilateral upper extremity injuries. Citing the Court of Appeals decision in Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994), the Special Administrative Law Judge found the carpal tunnel syndrome claim was not compensable. He reasoned that because the bright line rule announced in Berry defined the last date of work as the date of accident, claimant could not pursue a claim for carpal tunnel syndrome since she was still working. The Special Administrative Law Judge issued his Award September 1, 1995. On October 6, 1995, a

Court of Appeals decided the case of Condon v. The Boeing Co., 21 Kan. App. 2d 580, 903 P.2d 775 (1995). The Appeals Board finds the logic of respondent's argument, which was adopted by the Special Administrative Law Judge, was specifically rejected by the Court of Appeals in Condon. In that case, the Court held that the date of injury for repetitive trauma type cases is not always the last day the worker worked. In Condon a date of accident was utilized for computational purposes that corresponded with the date claimant received restrictions from her physician for her injury. Because those restrictions were designed to prevent further injury and the evidence established that any injury occurring after that date was insignificant and did not change claimant's limitations or ability to any extent, the Court of Appeals approved the Board's finding of an accident date which preceded claimant's last day of work. In this case claimant was given restrictions by her treating physician in September of 1993. Her permanent impairment was rated and permanent restrictions were issued by Dr. Schlachter on August 31, 1993, (not 1994 as found by the Special Administrative Law Judge). For purposes of this Award, the Appeals Board has adopted Dr. Schlachter's opinions as to impairment of function. As Dr. Schlachter testified that claimant's condition did not permanently change after August 31, 1993, the Appeals Board finds that date to be the date of accident for purposes of this award.

At oral argument respondent raised for the first time the provisions of K.S.A. 44-501(c) which provided:

> "Except for liability for medical compensation, as provided for in K.S.A. 44-510 and amendments thereto, the employer shall not be liable under the workers compensation act in respect of any injury which does not disable the employee for a period of at least one week from earning full wages at the work at which the employee is employed."

Generally the Appeals Board does not consider defenses which are raised for the first time on appeal and thus were not presented at a time when the opposing party had an opportunity to present evidence which may be relevant to the issue. Furthermore, the 1996 Legislature deleted the above-quoted language from the statute and provided that such change was to be retrospectively applied to all claims that had not been fully adjudicated. See K.S.A. 1996 Supp. 44-501a. Therefore, K.S.A. 44-501(c), as amended, does not preclude claimant from receiving permanent partial disability benefits.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the September 1, 1995, Award entered by Special Administrative Law Judge William F. Morrissey should be, and is hereby, modified to find claimant is entitled to an award of compensation against respondent for an accidental injury which occurred on August 31, 1993.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Lori A. Chaffin, and against the respondent, State of Kansas, and its insurance carrier, State Self-Insurance Fund, for an accidental injury which occurred August 31, 1993, and based upon an average weekly wage of $480.86 until October 6, 1994, when claimant's gross average weekly wage became $514.84, for 78.85 weeks of permanent partial disability compensation at the rate of $313 per week or $24,680.05, for a 19% permanent partial general disability.

As of January 10, 1997, all compensation is past due and ordered paid in one lump sum less any amounts previously paid.

IT IS SO ORDERED.

Dated this ____ day of January 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James B. Zongker, Wichita, KS
Jeffery R. Brewer, Wichita, KS
James R. Roth, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director